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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 293

ARMOUR AND COMPANY, A CORPORATION,
Petitioner,

against

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Respondents.

BRIEF FOR PETITIONER.

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Chicago, Illinois.

Chicago, Illinois, December 2nd, 1940.

THE GUNTHORP-WARREN PRINTING COMPANY, 549 WEST JACKSON, CHICAGO

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BRIEF FOR PETITIONER.

Definition of short terms used herein.

the interest of simple statement the words and
es listed below will be used throughout this brief in
f the more complicated but technically accurate lan-
e describing the same person or thing.

TATE COURT". The Circuit Court of Cook County, Il-
, wherein this cause was first begun, and from which
ause was removed to the Federal Court.

ISTRICT COURT". The District Court of the United
s for the Northern District of Illinois, Eastern Divi-

IRCUIT COURT". The United States Circuit Court of
als for the Seventh Circuit.

"ARMOUR". The plaintiff, appellant and petitioner, Armour and Company, described in the opening paragraphs of the Complaint. (Rec. 3, 4.)

"RAILROADS" or "RAILROAD". The defendant common carriers by railroad (or one of them) named as such in the complaint. (Rec. 3, 4.)

"UNION STOCK YARDS, ILLINOIS". The entire railroad station "area",* to which the railroads are engaged in transporting "property, including ordinary livestock." (Rec. 5.)

"PUBLIC YARDS". The public stock yards under jurisdiction of the Secretary of Agriculture "located at" the station Union Stock Yards, Illinois, but not comprising it. (Rec. 6, 7.)

"YARDS COMPANY". The Union Stock Yard and Transit Company, owner of the public yards, located within the limits of the railroad station area described in applicable railroad tariffs as "Union Stock Yards, Illinois".

"TEAM TRACKS". Tracks situated at the station "Union Stock Yards, Illinois" owned or used by the railroads, not serving the public yards, but available for tender of delivery of property consigned to that station to consignees. (Rec. 91, 92.)

"INDUSTRY TRACKS". Tracks owned by industries located at the station, "Union Stock Yards, Illinois" (Rec. 91, 92), not serving the public yards, but available for tender of delivery of property including livestock, to the owner by railroads.

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* "It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a 'switching district' or 'switching limits'. Within that area the carrier holds itself out as agreeing to deliver freight in its freight depot or at team tracks or on sidings or spur-tracks owned by an industry." (*United States* v. *American S. & T. Plate Co.*, 301 U. S. 402 at 409.)

Reference to the official reports of this case in the Courts below.

This case was decided by the District Court on May 31, 39, and is reported at 27 Fed. Supp. 625. On appeal to e Circuit Court primary and supplemental opinions that court were handed down on April 4th and May st, 1940, respectively. Both decisions are reported at 1 Fed. (2d) 913.

The three decisions appear at pages 46-55, 77-86, and -92 of the transcript of record herein.

Grounds on which the jurisdiction of this Court is invoked.

1. The petition filed herein invoked the jurisdiction of e Supreme Court established by Sec. 347(a) Title 28, S. Code Annotated (Sec. 240, Judicial Code, amended), ich reads as follows:

Sec. 347(a), Title 28, U. S. C. A.:

"(Judicial Code, section 240, amended.) Certiorari to circuit courts to appeal and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeal in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before, or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

2. The petition herein was filed, after due and sufficient y of the mandate of the Circuit Court (Rec. 94), and

within the time required by Sec. 350, Title 28, U. S. Code Annotated, which provides as follows:

Sec. 350, Title 28, U. S. C. A.:

"Time for making application for writ of error, appeal, or certiorari; stay pending application for certiorari. No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months. For good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court.

"Where an application for a writ of certiorari is made with the purpose of securing a removal of the case to the Supreme Court from a circuit court of appeals or the Court of Appeals of the District of Columbia before the court wherein the same is pending has given a judgment or decree the application may be made at any time prior to the hearing and submission in that court.

"In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to apply for and to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned the giving of good and sufficient security, to be approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer all damages and costs which the other party may sustain by reason of the stay."

The final judgment of the Circuit Court was entered

May 21st, 1940, and the petition filed herein for writ of certiorari within the three months' period provided by the section last above quoted.

3. The case involves the question of the jurisdiction of the District Courts of the United States under Sections 9, and 22, of Title 49, U. S. Code Annotated (quoted in full in Appendix A hereto) 1 and of the jurisdiction of the Interstate Commerce Commission under sections 9, 12(1), 13(1), 15(1), 16(1), of Title 49 of the U. S. Code Annotated. (Those sections are quoted in full in Appendix A hereto.)

We believe the District Court and the Circuit Court have erroneously denied their own jurisdiction, under Sections 9, and 22 of Title 49, U. S. Code Annotated, and have erroneously broadened the jurisdiction of the Interstate Commerce Commission beyond the limits thereof, as established by Congress in said Sections 9, 12(1), 13(1), 15(1), and 16(1) of Title 49, U. S. Code Annotated.

4. In *Mitchell Coal & Coke Co.* v. *Pennsylvania Railroad*, 230 U. S. 247, at page 250, the Supreme Court said:

> "The order of dismissal" (in the courts below) "was founded on the denial of jurisdiction, and this court has power to review that ruling."

Since this case presents an order of the courts below dismissing the complaint (Rec. 55, 86), which is also founded upon the "denial of jurisdiction" by those courts, it is believed the Supreme Court "has power to review that ruling".

Statement of the case.

1. *The Facts, the Cause of Action and the Questions Presented.*

(Numerical references are to pages of the record herein.)

Armour contracted, on usual bill of lading form (23-30) with the railroad, to transport a shipment of livestock from a certain origin to a station named in Defendant's tariffs as "Union Stock Yards, Illinois", and there to deliver the shipment to Armour. (9.)

Armour loaded the shipment on the railroad car at the origin point; delivered the shipment to the railroad at that point; paid the exact tariff charge applicable to the transportation service received, and in all things performed the transportation contract. (9.)

Before delivering the shipment to the railroad, Armour notified the railroad that it had cancelled all authority of and arrangements with the Yards Company, who operated a public stock yard within the station limits of the destination, under which the Yards Company had previously accepted, held, stored, weighed, driven and otherwise handled Armour's livestock as Armour's agent (10), and that the Yards Company now had no authority to accept, receipt for, handle, or otherwise serve the shipment about to be made. And Armour advised the railroad that it would accept delivery of this shipment, anywhere at this destination station that the railroad offered it; that it would even accept delivery at the public stock yards *if* the railroad would bear the expense arising from such use of the private property of the Yards Company. (11, 12; 32-36.)

The exact advice given the railroad was, that on arrival of the shipment, Armour would accept delivery "at and from such reasonable and proper delivery pens" *of the railroad,* anywhere at this station Union Stock Yards, Illi-

nois, but that it desired no stockyard service, and would pay no yardage charges or other charges for the mere delivery of the shipment, if the railroad elected to use the public yards, rather than to use pens of its own ownership. (Rec. 32, 33.)

Also previous to the acceptance of this shipment, by the railroad, the Yards Company had warned Armour, that if any of Armour's livestock came into its possession it would *never deliver them to Armour* unless Armour paid a yardage charge upon them. (35, 36.)

This threat was made known to the railroad before it undertook to transport the shipment (36) and the railroad had been warned that any delivery of the shipment to the Yards Company under such circumstances would constitute a conversion of Armour's property. (36.)

The shipment moved forward from the shipping point. When it reached the destination (Union Stock Yards, Illinois) the railroad made *no tender of the shipment to Armour*, on any team track, or any private track of Armour, in any pens controlled by the railroad, or at any other point within the station area. (10.)

On its own responsibility, and in disregard of the information it had received, the railroad placed the car in the possession and control of the Yards Company, while the livestock was still confined therein on the railroad's tracks, without consulting or advising Armour, and before making any tender of the shipment to Armour. (10.)

At no time had Armour attempted to direct or control the handling of this car at the destination station. It had not suggested any place, time, or manner of unloading, or holding pending tender of delivery of the load to Armour. (10.)

The first knowledge received by Armour, that the shipment had arrived, came in the form of a notice, not from the railroad, but from the Yards Company, that the Yards

Company had possession of, and was holding Armour's livestock in one of its pens. (10.) Armour demanded possession of its property. Its demand was refused, unless and until Armour paid the demands of the Yards Company. (14.) In mitigation of damages Armour paid the demands of the Yards Company for the railroad's account; demanded repayment from the railroad which had employed the Yards Company. (15.) That demand being refused, it brought this action.

In the foregoing summary we have described the facts with reference to a single one of many separate causes of action joined herein. A more general statement of the facts, with record references, appears at pages 3 and 4 of the petition herein.

Since the case is here on motion to dismiss, the facts above stated stand as admitted by each defendant. (*Kansas* v. *Colorado*, 185 U. S. 125 at 147; *Leimer* v. *State Mut. Life Assoc.* (C. C. A.) 108 Fed. (2d) 302 at 306; *Grain Belt Supply Co.* v. *Commission of Int. Rev.*; (C. C. A.) 109 Fed. (2d) 490 at 492.

No rate charged or act done by the railroad is alleged to have been unreasonable, preferential, or otherwise violative of any provision of the Interstate Commerce Act. There is no question involved requiring discretionary judgment. The sole question is one of law:

Did the conduct of the railroad above described, and the railroad's wrongful delivery of Armour's property to a third person, with railroad knowledge that such third person was wholly unauthorized to receive them, and would never make free delivery, to Armour; constitute an observance, or violation of the duties imposed upon common carriers by railroad by common law? Did that conduct constitute a breach, or an observance of the railroads contract of transportation?

There is no rate to be fixed or made. There is no practice involved, to be judged reasonable, unreasonable or preferential, or non-preferential. There is no administrative question to be decided.

(2) *Procedural History of the Case:*

Section 148, Chapter 110 of Smith-Hurd's Illinois Statutes Annotated provides as follows:

"(Civil Practice Act, Sec. 24.) Joinder of defendants—Suing in alternative.

"(1) Any person may be made a defendant who, either jointly, severally or in the alternative, is alleged to have or claim an interest in the controversy, or in any part thereof, or in the transaction *or series of transactions* out of which the same arose, or whom it is necessary to make a party for the complete determination or settlement of any question involved therein, or against whom a liability is asserted either jointly, severally, or in the alternative *arising out of the same transaction or series of transactions,* regardless of the number of causes of action joined.

"(2) It shall not be necessary that each defendant shall be interested *as to all the relief prayed for, or as to every cause of action included in any proceeding against him;* but the court may make such order as may be just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest."

Proceeding under that section, plaintiff filed its complaint in the State Court, joining in one proceeding, many separate causes of action against each defendant severally. The complaint sets forth facts showing that the several liability of each defendant, in each cause of action, arose "out of the same transaction or series of transactions" as required by that statute. (Rec. 11, 20.)

After removal of the cause to the District Courts, on defendants' several motions (Rec. 38-40) defendants moved to dismiss (Rec. 40-46), for want of jurisdiction of

the District Court over the cause of action set forth in the complaint. The corporate defendants advanced two grounds, and the receivers and trustees appointed by courts of the United States, a third ground.

The corporate defendants urged:

(a) that the cause of action asserted was one which could only be heard and determined in the first instance, by the Interstate Commerce Commission.

(b) that the Union Stock Yards and Transit Company was an essential party defendant. (Rec. 42.)

The defending receivers and trustees urged:

(c) that no leave had been secured by the plaintiff from the Federal Courts appointing them, authorizing the maintenance of the suit in question against them. (Rec. 74.)

The District Court sustained the motions upon all three of the grounds above stated. (Rec. 54, 55.) Plaintiff appealed to the Circuit Court which affirmed the District Court, in an opinion which made no reference to the second and third grounds above named. Upon proper stay of the mandate of the Circuit Court, Plaintiff filed the petition in this Honorable Court for writ of certiorari, which this Court has most graciously granted.

Specifications of Errors.

Our brief in support of our original petition to this Honorable Court, sets forth *inter alia,* the following specification of errors, at pages 6 and 7 thereof, and reasserts, at page 22, the specification of errors made in its appeal to the Circuit Court. (Rec. 59, 60.)

1. Said Circuit Court erred in declining jurisdiction of an action for damage arising from no violation of any pro-

vision of the Commerce Act, by any carrier subject thereto; and in holding that the Commerce Commission had exclusive jurisdiction of a cause of action in no way grounded upon a violation of that Act.

2. Said Circuit Court erred in holding that the District Courts of the United States (or the State Courts) were without jurisdiction to hear a case brought against a common carrier for mere overcharges above tariff rates, collected in violation of Section 6(7) of the Commerce Act.

3. Said Circuit Court erred in holding that an action for damages arising from a common carrier's wilful delivery of Plaintiff's property, to a third person, knowing that such person was *not* authorized to receive it as Plaintiff's agent, (such delivery being made before any tender of the property had been made to Plaintiff, and before Plaintiff had been afforded any opportunity to receive or remove it), while the property was still in carrier's cars on carrier's tracks; said delivery being made with full knowledge that said third person would *never* surrender the property to the owner except on the payment of additional moneys which said owner had not contracted to pay; involved *any* administrative question requiring prior recourse to the Commerce Commission.

4. Said Circuit Court erred, on motion to dismiss, in disputing and challenging, rather than accepting the facts plainly alleged in the complaint, and in substituting *ex parte* facts for the admitted facts, as the basis for its decision on the question of jurisdiction.

5. Said Circuit Court erred in holding that a common carrier could create an administrative question by its wilful and selective act, and thereby deprive the State and Federal Courts of jurisdiction (which they would have had but for such selection), of a cause of action for damages directly resulting from such wilful and selective act.

6. Said Circuit Court erred in holding that a recovery

of overcharges, collected in violation of Section 6 of the Commerce Act, could not be had if such overcharges were reasonable, under Section 1 of the Commerce Act.

7. Said Circuit Court erred in holding, with no knowledge of what the evidence would be in this case, or what it was in the case of *Swift* v. *Alton Railroad*,* that the Commission's decision of that case was "against Armour," and "stood in Armour's way," when the facts, the contractual status of the parties, and the questions of law involved in the two cases were entirely different.

These are here summarized as to cause, by a single specification, as follows:

8. The Circuit and District Court erred in constantly assuming, contrary to the alleged facts, that Armour desired or demanded its shipments to be delivered to it through the facilities of the Yards Company located within the limits of the destination station, and that as a result Armour was impliedly bound to make a reasonable payment to the Yards Company for such use of its property as resulted from that demand. (The similarity of name between the railroad *station* ("Union Stock Yards, Illinois") and the private property of the Yards Company, located within that station area,—frequently called the "Union Stock Yards"—no doubt contributed materially to the misconception under which the lower courts labored. The Railroad knew the description appearing in its own tariffs. Armour was not responsible for the existence of that confusing circumstance.)

Included in the specification of errors made to the Circuit Court (Rec. 59-60) and reasserted here (Petition, page 22) are the following:

> The court erred as a matter of law, in holding that defendants' agent, the Union Stock Yards Company, was a necessary party to the case for the following reasons:
>
> (1) No contract, express or implied, existed between plaintiff and said Company.

(2) The use of no property or facility of said Company or no service by said Company, was required or demanded by the plaintiff.

(3) No connection existed between said Company and any shipment involved herein by reason of any act or demand of plaintiff, but such connection as did exist, arose solely from defendants' action in refusing to tender said property at any point at said railroad station, except at a point located on the private property of said company. As a result, no obligation to pay for the use of said facilities or services existed, save on the part of defendants who had engaged them without plaintiff's consent, and against its will.

(4) Said Company had no connection with any transaction named in the Complaint, save as the employed agent of defendants.

The court erred in holding that the cause of action ated in the complaint was not one permitted to be rought against the trustee and receiver defendants ithout prior consent of the court or courts appointing ch trustees or receivers, under Section 66 of the udicial Code (Title 28, Sec. 125 U.S.C.A.).

Summary of Argument.

For convenience, we here reproduce the Summary of Argument appearing at pages 8-10 of our brief in support of our original petition herein. (Page references are to the pages of the original brief.)

Point 1.

Unless the complaint alleges a cause of action of which the jurisdiction of the Commission is exclusive, the decisions of the Circuit Court must be reversed. The existence of concurrent jurisdiction of Courts and Commission is not sufficient to sustain the decisions below. (Pg. 11.)

Point 2.

The cases of which the Commission has exclusive jurisdiction have recognized fundamental characteristics.

(1) They must involve *some* violation of *some* provision of the Commerce Act by a common carrier subject thereto.

(2) The violation of the Act must be one which exists or does not exist, depending upon whether, in the administrative judgment of the deciding tribunal, the evidence warrants the factual conclusion that the acts complained of fell within a generic description, forbidden by the Act; *i. e.*, unreasonable, preferential, etc.

If either of these conditions be absent, there can be no exclusive jurisdiction by the Commission. (Pg. 12.)

Point 3.

The complaint here contains no assertion that any defendant carrier subject to the Act in any way violated any provision of that Act. (Pg. 17.)

Point 4.

The Courts' assumption that the complaint establishes an assertion of overcharge, in violation of the Act, is grounded upon a denial of certain allegations of the complaint and a complete misconception of the the contractual status of the parties established by the complaint. (Pg. 18.)

(a) Even if the complaint alleged an overcharge in violation of Section 6(7) of the Act, no decision of the administrative questions referred to is required to determine that violation. (Pg. 19.)

Point 5.

The Circuit Court creates the only administrative question upon which its decision is grounded, by failing to accept the facts alleged in the complaint as true; thereby creating a contractual status between the parties which never existed. (Pg. 21.)

(a) No act or wish of the plaintiff caused the livestock in question to move through the public stock yards. (Pg. 24.)

(b) "Union Stock Yards, Illinois", is a tariff station, within the limits of which is located the public stock yards. Plaintiff billed its traffic for delivery *anywhere* at this station, and not at the public stock yards. (Pg. 27.)

(c) If the allegations of the complaint were merely doubtful or uncertain, the motion to dismiss should be denied. (Pg. 30.)

(d) The public stock yards were used for these shipments solely because the carriers elected to make delivery there, rather than on team tracks or elsewhere at "Union Stock Yards, Illinois". (Pg. 31.)

(e) Had the carriers paid the agent they hired, their selection of the public stock yards could have afforded no cause for complaint. (Pg. 31.)

(f) The Court has substituted the contractual status found in other decisions, for those alleged in the complaint, thus creating the administrative questions named. (Pg. 33.)

Point 6.

The decision of the Circuit Court is in conflict with the great weight of authority, either as to the jurisdiction of a cause of action involving no violation of the Commerce Act, or as to the jurisdiction of an action alleging a mere overcharge in excess of the tariff rate applicable. (Pg. 35.)

Point 7.

The collection of an overcharge is positively prohibited by Section 6 of the Commerce Act. The Circuit Court has held it cannot be recovered unless it is also unreasonable, under Section 1 of the Commerce Act. (Pg. 37.)

In this brief we will not again present our arguments upon the above points, but in the interest of brevity will

ncorporate those arguments appearing at pages 11-41 of ur original brief, by reference, and the reasons therefor:

We shall here concern ourselves more with the discussion of a common cause underlying the errors specified. Here, we shall consider the decisions of the District and Circuit Courts more broadly, and attempt to establish as nescapable the following conclusion:

Point 8.

At the root of each error hereinbefore specified, lies the Court's misconception of the legal relationship which existed, between Armour, the railroad, and the Yards Company. The lower court has assumed the legal relationship of the parties existing in other cases considered by this Honorable Court, and existing in *Swift & Co.* v. *Alton R. Co.*, 238 I. C. C. 179, to also exist here. Such assumption is negatived by the facts presented, and admitted here.

(1) A new factual situation is presented here, differing from that considered by this Court in prior cases.

(2) The *Hygrade* case (295 U. S. 193) involved a trilateral contractual relationship which does not exist in the case at bar.

(3) The *Swift* case (238 I. C. C. 179) involved a trilateral contractual relationship which does not exist in the case at bar.

(4) The finding that the Yards Company is a necessary party defendant is grounded upon a misconception of the contractual status of that company in this case.

(5) The Circuit Court's finding of "overcharge" in violation of the Commerce Act, is grounded upon the same misconception of fact and of contractual status.

(6) The Court's findings that administrative action is necessary to determine the existence of overcharge, is grounded upon the same misconception of fact and of contractual status.

(7) The same misconception of fact and of contractual status constitutes the basis for the Circuit Court's decision that the case of *Swift & Co.* v. *Alton R. Co.* (238 I. C. C. 179) "stands in Armour's way."

(8) The same misconception of fact and of contractual status, are probably responsible for the failure of the Circuit Court to note that the *Galveston* case (223 U. S. 481) and the *Covington* case (139 U. S. 128) are on factual fours with the case at bar, and are therefore controlling.

(9) The same misconception of fact, and of the remedy sought underlies the decision of the District Court that the federally appointed trustee defendants could not be sued here without the consent of the appointing courts.

Conclusion.

When the controlling issues of fact raised by the complaint, and the involved principles of law are correctly comprehended, it appears that there is no question of fact here requiring the peculiar qualifications of the Commission for decision, nor any question of law presented, which has been committed by Congress to the exclusive jurisdiction of the Commerce Commission.

ARGUMENT.

Every material error of the lower courts herein specified may be traced to the Court's assumption, specifically controverted by the admitted facts, that some legal relationship existed between Armour and the Yards Company, concerning the shipments here involved.

(1) *A new factual situation presented here, differing from that considered by this Court in previous cases.*

In our petition to this Honorable Court, at page 5, and in our brief filed in support thereof at page 22, we pointed out that in one particular, this case presented a factual and contractual situation never before considered by this Court, as far as known to us, in connection with livestock deliveries at the Chicago Public Stock Yards. Where, in the prior cases of *Adams v. Mills*, 286 U. S. 397, and *Atchison, T. & S. F. Ry.* v. *U. S.*, 295 U. S. 193, it appeared that the shipper had either commanded, or acquiesced in, the delivery of his shipment to and through the public stock yard located at the tariff station, "Union Stock Yards, Illinois";* in this case, the use of the public stock yard facilities was *forced upon* the shipper by the railroad, without his request for, or consent to, any such use of those public stock yard facilities.

Each railroad in this case could have *fully performed its contract of transportation,* and observed its common law duties, *without going near the public stock yard,* i. e., by delivery on railroad team tracks, through railroad owned pens, or on private sidings located at the same tariff station. Any such delivery would have been acceptable to the shipper.

*We shall hereinafter show that the same status obtained in the case of *Swift and Company* v. *Alton R. Co.*, 238 I. C. C. 179, in that the shipper there also demanded the public stock yard as the point of delivery.

The only case on factual fours with this case in this respect is that of *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128. There, as here, the use of the public stock yard as a delivering facility resulted solely from the adamantine insistence of the railroad to use the public yard rather than to make use of any other existing delivering facility, available at the same railroad station. There, and here, the sole cause of the use of the public stock yards as a delivering facility, was *railroad choice*.

We believe that the District and Circuit Courts have entirely overlooked the legal significance of this factual difference. As a result they have regarded the case just as though Armour, too, had directed these shipments to be sent to, and unloaded at, the public stock yard, and was here suing to recover the costs resulting from the railroads' obedience to its own orders in this respect. Such is not the case.

We believe that there is a marked difference, of great legal significance, between the contractual status and responsibility of shipper A, who (like the Hygrade Company in the *Atchison* case—See 295 U. S. 193, at 195, or like Swift and Company in the *Swift* case, 238 I. C. C. 179) *commands* a carrier to deliver his shipment to a public stock yards for unloading and delivery to him there; and shipper B, who *forbids* the railroad the right to make any such use of those yards, save at the railroad's own expense, and who offers to accept delivery at *any point the railroad may select*, within the limits of the same station.

We start with the principle laid down by this court in *Covington Stock Yards* v. *Keith*, 139 U. S. 128, at 136, to the effect that a railroad carrying livestock, has the *absolute right to select* the specific point within the boundaries of the destination station, at which it will make deliveries of livestock; and if it refrain from assessing, or allowing to be assessed, an extra charge for the use of

the facilities selected by it at such point, no shipper has cause for complaint.

It follows that when a shipper invades the carrier's right to designate or select the specific point of delivery at a given station, and names his own point of delivery, there may arise an implied contract to pay any extra costs that may result from his invasion of the railroad's right. But no such contractual obligation may be imputed when the shipper, not only fails to make any selection of any one of several available points of delivery within the station limits, but warns the carrier *not* to use one of such facilities unless the carrier is willing to absorb the extra cost arising from the use of that facility.

If, in addition to the mere use of the delivering facilities selected by the shipper, the shipper also contracts for stock yard service to be performed by the Yards Company, after railroad delivery is complete, there arises an additional contractual relation between the shipper and the Yards Company.

(2). *The Hygrade case* (295 U. S. 193) *involved a trilateral contractual relationship which does not exist in the case at bar.*

For purpose of contrast, let us analyze the exact contractual status of the Hygrade Company, the shipper in the *Atchison* case (295 U. S. 193) and particularly his relations with the Yards Company in that case.

First, Hygrade did *not* direct delivery of its shipments merely at *any* point,—team track, private track, industrial siding, or elsewhere—within the limits of the station "Union Stock Yards, Illinois." Hygrade closed the door to any such election by the railroad by *itself* choosing the exact point in those station limits, where it chose to accept delivery, viz., the Public Stock Yards.* By so lim-

* "To avoid that burden, the Hygrade Company elects, as did its predecessors, to have all livestock intended for slaughter at the plant shipped to the stockyards." (*Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193 at 195.)

iting the carrier's choice, Hygrade imposed the cost of unloading upon the railroad. Had Hygrade selected, or had the railroad been free to select, a team track, or private siding, at the same station, the railroad would have escaped that cost, as Hygrade itself would have been compelled to unload.

It would seem logical that if any increased expense arose by reason of the Hygrade Company's selection, that there would result an implied promise of the Hygrade Company to pay the extra cost of the facilities so used at its direction. This presumption would create an implied contractual relation between Hygrade and the owner of the facilities, the Yards Company, requiring Hygrade to pay the cost of that use.

But this was not all. After taking possession of its animals at the chosen point of tender, within the public stock yards, Hygrade did *not* passively wait to be shown how he might remove the animals from that point to a public street. Hygrade began to dictate* the route to be used; to demand the use of a specific overhead runway and tunnel, to the very door of its plant. As this Court pointed out, no railroad was obligated to buy Hygrade a privately owned means of access to its plant. Hence, there was created a second implied promise to pay the owner of these private facilities for their use.

Summarizing, we have the following contractual relationships between Hygrade, the railroad, and the Yards Company, appearing in the *Atchison* case (295 U. S. 193):

1. Hygrade and railroad. A contract of transportation and delivery to a specific point, within the destination station limits, selected by Hygrade, viz., the public stock yards.

* "Consignee also sought free use of the Yards Company's properties including the overhead runway to take its animals from holding pens as well as from unloading pens to its plants." (*Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193 at 200.)

2. Railroad and Yards Company. A tariff contract to furnish the facilities and services necessary to unload the animals into suitable pens.

3. Hygrade and Yards Company.

(a) An implied contract to pay any excess in cost, arising from Hygrade's invasion of the carriers right to select the point of delivery, by Hygrade's selection of the public stock yards as the point of delivery, if any excess cost resulted.

(b) An implied contract to pay for the use of the overhead viaduct, tunnel, runways, etc., specifically demanded by Hygrade, as its preferred route from the point of delivery to its plant.

This is in truth a situation of *trilateral contractual relationships*, a "tri-party relation" as the Circuit Court twice styles it. (Rec. 83, 84.)

If the complaint here be examined, the factual differences between this case and the *Atchison* case (295 U. S. 193) will be instantly apparent. One of the three sides of the "tri-party relation" existing there, is *non-existant here*, for there is here *no* express or implied contractual relation existing between Armour and the Yards Company whatsoever.

We have a contract between Armour and the railroad. (Rec. 9.) But that contract merely covers transportation to *any* delivery point in the wide area* comprising the station "Union Stock Yards, Illinois," that the railroad might select. There was no selection by Armour of team track, private track, public stock yards or elsewhere, as the delivery point. On the contrary Armour warned the railroad *not* to use the public stock yards, save at the railroad's *own* expense. (Rec. 36.) The sole demand made by Armour was

* "It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a 'switching district' or 'switching limits'. Within that area the carrier holds itself out as agreeing to deliver freight in its freight depot or at team tracks or on siding of spur-tracks owned by an industry." (*United States* v. *American S. & T. Plate Co.*, 301 U. S. 402 at 409.)

for a delivery in *some* pens owned or controlled *by the railroad.* (Rec. 33.) The situs of those pens was left entirely open for establishment by the railroad. It follows, there is here no promise to be imputed to Armour, to pay any extra expense that might arise from the railroad's selection of the public stock yards as the point of delivery. Armour made no selection of a specific delivery point such as Hygrade did.

Nor did Armour, after taking possession of the animals, attempt to dictate or control the route and means of removal, as did Hygrade. (Rec. 16.)

All that Armour demanded was that the railroad provide a means of ingress and egress to *whatever point the railroad chose as the delivering point* at this station. If the railroad chose Armour's private siding, the question was moot. If the railroad chose to use the same team track on which it was delivering a third of the other direct shipments to Chicago packers,* the demand was for ingress from, egress to, and a free delivery at that team track. Or if the railroad elected to provide and use pens of its own, or the facilities of the public stock yards, the demand was for ingress and egress to and from the chosen pens, wherever they were. Any demand for delivery specifically at the public yards, and any demand for any stock yard service on these animals is specifically negated by the complaint. (Rec. 37, 38.)

Where in the *Atchison* case (295 U. S. 193) there were two separate and distinct contractual relationships between the consignee and the Yards Company, here there is *none.* The only relationships existing in this case, are: First, the relation of shipper and carrier between Armour and the railroad. The Yards Company not a party to that contract. That contract was *capable of complete perform-*

* "More than one-third of the direct shipments of livestock arriving at Chicago is unloaded at points other than the Union Stock Yards". (*Swift & Co. v. Alton Railroad Co.*, 238 I. C. C. 179 at 189.) The decision is appended to the brief of certain respondents in opposition to the petition for certiorari filed herein.

ance by the railroad without any use of Yard Company's property whatever, i. e., by electing team track delivery, private siding delivery, or by the construction or leasing of carrier owned pens within the station limits, at a point removed from the public stock yards.

Second, there was the relation of principal and agent, or employer and employee, between the railroad and the Yards Company. Armour bore no relation and was not a party to that contract. It was not made at Armour's request or for its especial benefit. The railroad, free from any direction or suggestion or attempted control by Armour (Rec. 10), chose to employ the Yards Company, rather than build pens of its own, or tender delivery elsewhere. At the time of that choice the animals were still in railroad cars on railroad tracks, and *no tender of any delivery had ever been made to Armour,* up to the time the railroad made its election to hire the Yards Company. (Rec. 10.) Not until after the railroad's contract of employment with the Yards Company had been made and performed, did Armour receive any notice that its shipments had arrived. (Rec. 10.)

Thus Armour was not a party to the contract whereunder the Yards Company was hired by the railroad, *any more than it was a party to the railroad's contract with the engineer who brought the car to its destination.* By notice previously given (Rec. 12, 36) it had completely forestalled any possibility of an implied obligation to pay for the facilities of the Yards Company, by directing the railroad *not* to deliver to the Yards Company, save at its own expense (Rec. 36), and by directing the Yards Company to render no services for Armour upon said shipments. (Rec. 37-38.)

Thus, there is no scintilla of factual support for the Circuit Court's assumption that the same "tri-party relation," between shipper, railroad and Yards Company, existed here, such as "came into existence" in 1865 (Rec. 83); such as existed in the *Atchison* case (295 U. S. 193)

and in the *Adams* case (286 U. S. 397). On the contrary the allegations above cited affirmatively establish that there was no contractual relationship between Armour and the Yards Company here, and consequently could be no such "tri-party relationship," as the Circuit Court twice describes.

(3) *The Swift case* (238 I. C. C. 179) *involved a trilateral contractual relationship which does not exist in the case at bar.*

That same factual difference also distinguishes the *Swift* case (238 I. C. C. 179) from the case at bar. At page 189 of the decision, speaking of the Swift shipments, the Commission said:

> "It appears therefore that direct shipments of livestock are unloaded at the Union Stock Yards, *only when complainant elects to take delivery there*".*

Thus the contractual status of the shipper in the *Swift* and *Atchison* cases was the same. Each had invaded the railroad's right of selection of the point within the station limits at which delivery was to be made. The public yards were used because of some act or direction of the shippers, which created a "tri-party relation". In the case at bar no such "election to take delivery there" was made by Armour. The election to use the public yards in the case at bar was solely the election of the railroad, to use those facilities rather than to provide pens of its own, or tender the same delivery on team tracks it was currently affording to other shipments.

It may seem that we have unduly stressed this erroneous factual assumption made by the District and Circuit Courts. But we believe that every material error of the

* As a matter of information, in a bill filed in the District Court October 7, 1940 by Swift and Company (under the theory of the decision of this Court in *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125) Swift and Company have assailed many findings of the Commission in this decision, asserting error. But the finding above quoted is *not assailed* in that bill as inaccurate or unsupported by evidence.

courts below is rooted in this misconception of the rights, remedies and liabilities of the parties. We shall now attempt to justify our belief in this respect.

(4) *The finding that the Yards Company is a necessary party defendant, is grounded upon a misconception of the contractual status of that company in this case.*

We have shown that the railroad could have completely performed its contract with the plaintiff without going near the public stockyards. We have shown that the complaint negatives any possible imputation of a contractual status between Armour and the Yards Company. We have shown that no question is raised to the measure or reasonableness of the Yards Company's charge, or to its right to make a charge for the use made of its property.

The language of the District Court displays a complete disregard of these facts. The opinion states that Armour asks a court order "compelling defendants to provide plaintiff suitable *ingress to the Yards of the Stock Yards Company* and egress from the Yards". The court inquires "How the Court, not having jurisdiction of the Stock Yards Company could enforce such an order, Plaintiff does not explain". (Rec. 54, 55.)

Our answer is, the District Court has imputed an objective we do *not* seek. No use of the Yards Company's property, no ingress to or egress from that property is required to satisfy Plaintiff's demand. The prayer of the complaint was not directed at any use of the Yards Company's property. It merely asked an order directing delivery "at the unloading pens *of the Defendant*" (not of the Yards Company) "or at such other point as same may be tendered * * * free from any lien * * * of the Stock Yards Company, *or* of any other person * * *." (Rec. 21.)

Thus the error of the District Court lies in stating the case* and the relief sought, not in its decision. The decision is of a moot question.

(5) *The Circuit Court's finding of "overcharge" in violation of the Interstate Commerce Act, is grounded upon the same misconception of fact and of contractual status.*

Likewise the Circuit Court's finding that our suit is for "overcharge" connotes the impression that some contractual status existed between Armour and the Yards

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* Other erroneous statements of the District Court are as follows:

"Defendants' station" (Union Stock Yards, Illinois) "is *not* located on the property of the defendants or any of them * * *." (Rec. 51.)

"Plaintiff has long known that the Union Stock Yards Station of defendants was on the property of * * * the Yards Company." (Rec. 53.)

(There is no allegation in the complaint warranting this assumption that defendants tariff station was exactly coextensive with the public yards.)

"About ten days prior to the 25th of May, 1933 Plaintiff notified the defendants * * * that it did not desire the services of that" (the Yards) "Company (*other than the service of unloading* * * *)." (Rec. 52.)

(No allegation of the complaint warrants this implication that Plaintiff desired unloading, which it could only receive free at the public stock yards. The notice named refers only to "pens of the carriers". (Rec. 33.) Whether unloading was to be received or not depended upon what pens the carriers chose to make theirs.)

"* * * and demanded that the defendants * * * permit it" (Armour) "to remove it" (livestock) "from the Stock Yards * * *." (Rec. 52.)

(We have shown the utter lack of support for this statement.)

"It now demands * * * that it be given the right of ingress to and egress from the *property of the Stock Yards Company* without * * * payment to that Company." (Rec. 53.)

(That demand is only conditioned upon the prior free choice and election of the railroad to tender delivery there and to refuse to tender it elsewhere.)

"* * * plaintiff * * * are now consigning their stock to the Union Stock Yards *station*. Knowing * * * *it could not be removed* * * * *without use of facilities owned by the Stock Yards Company*." (Rec. 54.) (An wholly incorrect statement.)

"Plaintiff prays * * * injunction compelling defendants to provide suitable ingress *to the yards of the Stock Yards Company*, and egress from the yards, * * * without payment of any charge." (Rec. 54-55.)

(The prayer is for "suitable ingress for Plaintiff to the point at which delivery of livestock is tendered," (not the public stock yards) "and proper * * * egress for removal of its livestock from the unloading pens *of the defendants*," (not of the Yards Company), "*OR* from such other point in said station where delivery *may be* tendered at the Union Stock Yards, Chicago, Illinois, without the payment of any charge * * * to the Stock Yards Company, *or to any* other person * * * save and except the said rates for transportation." (Rec. 21.)

The prayer clearly covers any point the railroad may select, *including the* stock yards.

The alternative is for egress "from the pens of the Defendants *or* the Union Stock Yards.")

Company. No railroad collected anything but its tariff rate. (Rec. 9.) The payment made to the Yards Company was made in connection with *no contract for transportation.* Hence that payment could not be an "overcharge" forbidden by Section 6(7) of the Interstate Commerce Act. The payment would have been the same had the carrier chosen to deliver the shipment to Swift & Co. Would a payment to Swift for a similar unauthorized use of its property in effecting delivery to Armour be an "overcharge"?

Thus the error of the Court is in assuming the contractual status of shipper and carrier, essential to overcharge, to exist here between the Yards Company and Armour. The Circuit Court made no mention of there being any other violation of the Commerce Act by any carrier, asserted in the complaint.

With the disappearance of this sole violation of the Commerce Act the possibility of Commission jurisdiction completely disappears, and Section 22 of the Commerce Act leaves the case where it is,—in the courts.

This subject is further discussed at pages 11-21 of our brief in support of our original petition.

(6) *The Courts' findings that administrative action is necessary to determine the existence of overcharge, reflects the same misconception of fact and of contractual status.*

The Circuit Court describes five factual considerations (which it holds to be administrative in nature), which it holds must be considered and decided before the existence or non-existence of this single violation of the Interstate Commerce Act, viz., "overcharge" can be determined.

These are (Rec. 84):

The history of the Chicago Stockyards.
The use of these yards as the carrier's usual place of delivery.

The history of the yardage charge.
The tri-party relation.
Other facts of transportation incidental to rate making.

In our primary brief (pages 19-21) we established that overcharge, forbidden by the Act, is the mere difference between the lawful applicable tariff charge and the larger amount paid to the contracting railroad. Certainly the *tariff published rate* applicable cannot be different depending upon what the evidence may show concerning the "history of the yardage charges," etc. Nor can the number of dollars paid by Armour be altered, depending on the "history of the Chicago Stockyards" or of its charges, etc. Whatever those historical facts be, the tariff rate, and the amount paid remain constant.

The total irrelevance of any of these alleged administrative facts is made more obvious by recalling that Armour made no requirement, in fact forbade, any use of the Yards property for its account, and offered to take delivery anywhere at this station. The railroad could have made full performance without going near the public yards.

Realization of this fact creates this dilemma:

Either the Circuit Court has erroneously assumed that some contractual status—some relation of shipper and carrier essential to "overcharge,"—existed between Armour and the Yards Company, to which these facts related; or, the Circuit Court has in effect ruled that a carrier, by its willful and disobedient act, may *compel* a shipper to contract and pay for the use of terminal facilities or services, which it does not need, nor desire.

It is obvious, that had the railroad's election been different; had the railroad elected to tender delivery on team tracks, as they did as to one-third of the direct shipments received at Chicago, or on Armour's private siding, or at newly constructed pens of their own, the "history of" the

public yards; the "history" of the Stock Yards charges; the "tri-party relation" and the other administrative considerations named by the Circuit Court *would have been wholly moot to any issue in the case.*

Can those facts be of greater significance when they appear solely because of the willful act of a railroad, in disregard of its contracts and common-law duties? Can a railroad make the "history of the Chicago Stockyards" relevant; *create* such administrative questions; and thereby *deprive* the courts of jurisdiction by its own willful and disobedient act, in delivering Armour's property to a third person not entitled to receive it, and not an agent of Armour, and at a point not requested or consented to by Armour?

(7) *The same misconception of fact and contractual status constitutes the basis for the Circuit Court's decision that the Commission's decision in Swift & Co. vs. Alton Railroad,* 238 I. C. C. 179, *"stands in Armour's way".*

In addition to discussing this point we shall divert to explain a most unfair implication cast by page 17 of respondents' original brief.

Since the respondents have incorporated the decision of the Commission in *Swift and Company* v. *Alton Railroad,* 238 I. C. C. 179, into this record; and since Armour is shown to have been a party to that proceeding, we believe we should point out that Armour was not seeking dual relief for the same wrong, from both the courts and the Commission, a course prohibited by Section 9 of the Interstate Commerce Act.

After this suit was filed* in the State Court, the complaint of Swift and Company to the Commission was set

* Referring to Armour's petition of intervention in the *Swift* case, the Commission said (page 180): "In this petition it" (Armour) "stated that it *had* instituted a proceeding in the State Court involving substantially the same issues and praying for similar relief."

for hearing. As the Commission's decision shows, that case, like the *Atchison* case (295 U. S. 193), involved shipments "unloaded at the Union Stock Yards *only when complainant elects to take delivery there*".

It is significant to note that Armour's petition stated that it *had* prayed relief, not from the Commission, but from the courts. The description of the petition by the Commission, negativing any prayer for *any relief from the Commission* in Armour's petition of intervention, was a correct reflection of specific statements made in that petition.

It was conceivable that, in the future, Armour might have an occasional shipment which it too would "elect to take delivery there"; *i. e.*, at the public yards, for the purpose of having the animals weighed, or, if Armour's own pens were full, perhaps stored and otherwise served by the Stock Yards Company, after the carriers had completed their contract of transportation by delivering to the person to whom Armour had directed delivery in the case assumed.

If the evidence shall show any such shipment made after the commencement of the Swift hearing, it is obvious, that as to a shipment so ordered into the public yards by Armour, the decision in the Swift case "stands in Armour's way" (Rec. 92). But it is wholly a *non-sequitur* to say that the same decision also "stands in Armour's way" as to a shipment *never* directed into the public stockyards by Armour, and taken there against its will and without its consent, as the Circuit Court has held.

In substance, Armour may be assumed to have been interested in the question raised by the Swift complaint, of the reasonableness of the practices of the carriers, on any occasional shipments Armour might thereafter order into the public stockyards, to be served by the Stock Yards

Company, after transportation had been completed by delivery to the person to whom Armour directed delivery.

But until evidence shall show that Armour here attempts to recover damages on some shipment which it *did* order into the public yards, that case cannot concern nor affect the shipments here involved. Armour did *not* order these shipments into the public yards. They were taken there without its consent, by the willful and disobedient act of the railroad.

(8) *The same misconception of fact and of contractual status are probably responsible for the failure of the Circuit Court to note that the Galveston* (223 U. S. 481) *and Covington* (139 U. S. 128) *cases are on factual fours with the case at bar, and are therefore controlling.*

The Circuit Court's disregard of two decision of this Honorable Court, heavily stressed by petitioner in its presentation to that court, can only be explained by this same misconception of fact and contractual status.

Galveston, Harrisburgh and San Antonio v. *Wallace*, 223 U. S. 481, was a proceeding arising a few years after the decisions of this Court in the *Abilene* (204 U. S. 426), *Robinson* (222 U. S. 506) and *Pitcairn* (215 U. S. 481) cases. The plaintiff in that case sought to recover the value of property shipped by the defendant railroad to a destination on a connecting line, and never delivered. Plaintiff proceeded in the State Court, relying upon the then new Carmack Amendment to the Commerce Act (Sec. 20(11) of the Commerce Act), for its right to sue the originating railroad, for loss or damage occurring on a connecting line.

The railroad (as does the railroad here) attacked the jurisdiction of the Court on the theory, since plaintiff's action was grounded on the Commerce Act, primary resort to the Commerce Commission must be had and urged the

doctrine of the *Abilene* (204 U. S. 426), *Robinson* (222 U. S. 506), and *Pitcairn* (215 U. S. 481) cases.

The Supreme Court disposed of this contention in one brief statement at page 490 (emphasis supplied):

> "But damage caused by failure to deliver goods *is in no way traceable to a violation of the statute*" (the Commerce Act) "and is not therefore within the provisions of Sections 8 and 9 of that Act" (restricting remedies to the Commission or the Federal Courts, to the exclusion of the State Courts).

The damages sought here are damages "caused by failure to deliver goods". Whether the misdelivery had been made to Swift and Company, to a Livestock Commission firm, or to the Yards Company, the damage remains the same, being the cost to Armour, of recovering that possession of its property, which it was entitled to receive from the railroads without cost.

The railroads have sought to differentiate this case from the case at bar by contending that here "there is no allegation that the livestock were lost".

Nor was there any such allegation or proof in the Galveston case (223 U. S. 481). We quote from the opinion of this Court (223 U. S. at 489):

> "Neither the pleadings nor proof showed what this company did with the mohair, nor the cause of its nondelivery, if indeed it was not delivered. For there was some evidence tending to show that this mohair might have been among other sacks, the marks of which had been destroyed, and were still held by the consignee awaiting identification."

So far as the decision goes, the mohair involved in the *Galveston* case might have been in the hands of a warehouse Company, which, like the Yards Company here, was demanding charges which the shipper refused to pay. Many other assumptions of similarity might be made.

But in the last analysis, in both this case, and in the *Galveston* case, the damages sought resulted from the rail-

road's *failure to deliver to the person entitled to the property.* Only the measure of damages differs. In the *Galveston* case, the measure of damages was the full value of the property misdelivered. Here it is the full cost of recovering the property misdelivered. And this Court has said that "damage caused by failure to deliver goods is in no way traceable to a violation of the statute" (the Commerce Act). Therefore the Commerce Commission could have no jurisdiction of the cause.

The distortion of this claim for damages for misdelivery, into an "overcharge" by the Circuit Court could, we believe, only be predicated upon a total misconception of the contractual status of the parties involved in the transaction.

We have previously (page 20) commented upon the identity in the contractual status of the parties here, and in the *Covington* case (139 U. S. 128), and will not repeat those comments here.

(9) *The same misconception of fact and of remedy sought underlies the decision of the District Court that the Federally appointed trustee defendants could not be sued here without consent of their appointing courts.*

The Circuit Court affirmed without comment, the decision of the District Court to the effect that the trustee-receiver defendants could not be sued here without the consent of the Federal Courts appointing them.

Sections 124, 125, Title 28, U. S. C. A., pages 173 and 212 (Sections 65 and 66 of the Judicial Code), read as follows:

> "Section 124. (Judicial Code, section 65.) *Management of property by receivers.* Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property

shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

"Section 125. (Judicial Code, section 66.) *Suits against receiver.* Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

The District Court refused to apply these sections in the case at bar, and held that it was incumbent upon Armour to first obtain the consent of the appointing Federal courts, to the maintenance of this suit. (Rec. 55.)

The legal error thus committed by the District Court is worthy of passing comment. The first case cited in support of the Court's ruling is *Barton* v. *Barbour*, 104 U. S. 126.

That decision was made in 1881.

The above statutes were passed in 1887.

The repeal of the decision in *Barton* v. *Barbour*, by the subsequent enactment of the statute, was noted by this Court in *Texas & Pac. Ry.* v. *Cox*, 145 U. S. 593 at 601, and in *McNulta* v. *Lochridge*, 141 U. S. 328, at 330.*

Briefly the cases upon this point divide very clearly into two classes. Whenever the *right to possession* or *right to control* or operate the trust estate is affected by the proceeding; or where the priority of the asserted claim is involved, the consent of the appointing court must be obtained. But where the suit merely seeks to establish a *liability* for wrongful acts, that consent is not a prerequisite to the prosecution of the suit.

* (See also *Central Trust Co.* v. *Wheeling & L. E. R. R. Co.*, 189 Fed. 82 at 84.)

Thus in *Ex Parte Baldwin*, 291 U. S. 610, the collateral suit was to wrest actual possession and control of a portion of the receivership estate from the receiver and from the Court.

In *Merryweather* v. *United States*, 12 Fed. (2d) 407, the government sought to assert collaterally a priority of its claim. In each case it was held that prior consent of the appointing court must be had and obtained. But suits for the receiver's violation of law, contract, or for negligence in operation fall within the purview of the statute above quoted. The dividing line is clearly established in the following decisions: (*Erb* v. *Morasch*, 177 U. S. 584 at 585; *Willcox* v. *Jones*, 177 Fed. 870 at 872; *Central Trust Co.* v. *St. Louis A. & T. Ry. Co.*, 41 Fed. 551 at 554-5; *Central Trust Co. of N. Y.* v. *Wheeling & L. E.*, 189 Fed. 82 at 84; *Ex Parte Tyler*, 149 U. S. 164 at 181.)

Summarizing, any court otherwise having jurisdiction, may adjudicate and fix the measure of the responsibility of a Federally appointed trustee without consent of the appointing court. But the enforcement of the collection of the amount so fixed, or any question of priority of the resulting claim, or any interference with the possession or control of property thus in *custodia legis*, can only be had at the hands of the appointing court.

The District Court's conception of this suit as an attempt to interfere with the possession, operation or control of the property in possession of these Federal trustees and receivers, in our opinion, can only be explained on the theory that the District Court wholly misconceived the basic cause of action here asserted, not only with respect to the facts and the contractual status of the parties, but in a broader way, to which subject we shall next advert.

This suit is not a suit for injunction, with incidental damage requested. It is a simple suit for damages, for violation of law and contract. The injunctive relief prayed is directed solely at the continuance of such contractual and legal violations as may be found to have existed in the past.

It is significant to us that while the District Court's opinion makes but casual reference to the fact that Armour seeks damages for breach of contract or common law duty by the railroad, the injunctive relief is stressed throughout. (Rec. 46-55.) That Court's statement of the case (Rec. 46, 47) makes it appear that some affirmative order is requested against the trustee and receiver defendants, which would interfere with their management of the respective estates in their control.*

We plead guilty to contribution to this misleading statement, because of the order in which the requested relief is stated in the prayer of the complaint. But a reading of the entire complaint reveals that the foundation for the legal and equitable relief, is a repeated breach of contracts of the same terms, and of repeated disregard of the same common carrier common law duties.

Because these contracts and duties have been broken and disregarded in the past, damages are prayed. Because of the threat that the breaches and disregard will be continued in the future, with the resulting multiplicity of suits, an order is prayed asking that these trustees and receivers be ordered to *obey the law*, in their operation of these properties.

The damages prayed are wholly independent of the equitable relief requested. This Court might decide, that the railroads, trustees and receivers had damaged Armour by their past conduct, yet fail to find grounds for the equitable relief prayed. The finding of breach of contract and of common law duty in the past, is a condition precedent to the equitable relief prayed, in that *if* the railroads' conduct in the past was lawful, there is nothing to enjoin for the future.

Or, this Court might conclude that while the damage inflicted by the actions of these trustees in the past could be

* See footnote, page 28, *supra*.

reduced to judgment in this Court, that the equitable relief of injunction, merely requiring them in the future to "manage and operate" the property in their possession "according to the requirements of the valid law of the state in which such property shall be situated," as required by Section 124 of Title 28 U. S. C. A. (quoted at page 35 *supra*), was not a form of relief to which Armour was entitled at the hands of this Court.

In addition to the erroneous concept, appearing throughout the opinion of the District Court, that Armour demanded some free use of the private property of the Yards Company,* there is added this concept that the suit in some way sought to interfere with the free operation and control of property in *custodia legis*.

Such interference as Armour seeks to enforce upon these trustees is the *interference of the law itself*. It is the law, not the injunction, that places upon them the duty of delivering property they transport, to the right person. All that was here sought by way of injunction, was an order that these trustees *obey the law applicable to their operations*, as Section 124, Title 48, U. S. C. A. requires that they do.

When the controlling issues of fact raised by the complaint, and the involved principles of law are correctly comprehended, it appears that there is no question of fact here, requiring the peculiar qualifications of the Commission for decision, nor any question of any law presented which has been committed by Congress to the exclusive jurisdiction of the Commerce Commission.

As will appear from the briefs of the parties herein, any Court hearing this case on the merits, will be called upon to make a finding based on the evidence on this question:

> Did Armour direct these shipments into the public stockyards, or did the carriers take them there of their own volition?

* See footnote, page 28, *supra*.

The Court's finding will be supported by evidence of the most ordinary type,—letters, verbal instructions, telephone conversations, bills of lading, written notices, and other ordinary evidence, requiring no technical knowledge or experienced judgment of the type ordinarily attributed to the Commission. It will be evidence of the type ordinarily considered by any court every day.

If that finding of fact be that Armour did not direct the use of the public yards, there will then arise the question of the capacity in which the Yards Company came into possession of the livestock, and the capacity in which it refused to surrender possession of them, until Armour paid toll.

The evidence will establish grounds for one of two findings on fact on this point either:

(1) That the railroad's delivery to the Yards Company was the delivery of a principal to an agent, for the specific purpose of completing the railroad's contract with Armour, or

(2) That the railroad's delivery to the Yards Company was a final delivery disassociated from any contract of agency.

Either of these findings, *i. e.*, whether the relation of principal and agent existed or not, are findings which any court is regularly called upon to make, from facts such as would be involved here. No experienced judgment in technical matters is required to consider the evidence and conclude whether or not the relation of principal and agent existed between railroad and Yards Company or not.

Depending upon which of the foregoing findings be made, one or another conclusion of law will follow. Precedent to a discussion of that legal alternative, we quote those portions of Sections 89 and 90, Title 49, U. S. Code Annotated, which may be involved in one of these alternatives.

"Section 89. Delivery; when justified.

A carrier is justified, subject to the provisions of

the three following sections, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a straight bill for the goods, * * *."

"Section 90. Liability for delivery to person not entitled thereto.

Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods."

Here, Armour was clearly the "consignee" named in the bill of lading (Rec. 9), and the "person lawfully entitled to the possession of the goods" within the meaning of Section 89 above quoted. Armour was also the one having "right of property or possession in the goods" as defined in Section 90 above quoted.

If the legal conclusion be that the Yards Company was the employed agent of the railroad, the status of the Yards Company toward Armour was the same as that of the engineer who pulled the train, or the agent who signed the bill of lading. Armour had no contract with any of them.

If we assume the agency relation existed, then the refusal of the Yards Company to deliver to Armour on demand, or to make any delivery save on payment of ransom, which Armour had never agreed to pay, *was the refusal and demand of the railroad itself.* The railroad is directly responsible, to Armour, just as it is for negligence of its engineers.

> "If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees." (*Covington Stock Yards* v. *Keith*, 139 U. S. 128 at 135-6.)

But if we disregard the agency, and regard the refusal of the Yards Company to deliver, as the act of an independent person, then the Yards Company came clearly within the category described in Section 90 of Title 48 (above quoted) and was "one who is not lawfully entitled to the possession" of the livestock in question. The delivery by the railroad to the Yards Company was after Armour, "having a right of property or possession of the goods" had specifically "requested" the railroad "not to make." (Rec. 36-37.) It was a delivery when the railroad "Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods." (Rec. 36-37.)

Summarizing:

If the fact be that the railroad and not Armour, hired the Yards Company in this matter, and if the railroad seeks to justify its delivery to the Yards Company, as the rightful employment of an agent, to do its work, then the refusal of the Yards Company, and the demands of the Yards Company, were the railroad's own refusal and demand, just as the negligence of its engineer is the railroad's negligence.

If the railroad denies the agency of the Yards Company, so as to escape the consequences of the refusal of, and the

demand upon Armour made by the Yards Company, then the railroad's delivery to the Yards Company, was a delivery wholly in contravention of the Sections of the Bills of Lading Act above quoted, and the railroad is "liable" to Armour the person "having a right of property or possession in the goods."

Neither of the ultimate questions involved in this dilemma are questions presenting any administrative difficulties. No question of reasonableness, or preference, or of "the history of the Chicago stockyards" or of the yardage charges, exists. No questions requiring technical skill or informed judgment appear. The Commission is without exclusive jurisdiction to determine the basic legal question whether the railroad employed the Yards Company as an agent, or not. If it did, the Commission is without power to change the responsibility which the refusal to deliver and the demands of the Yards Company, *imposed upon the railroad as a matter of law.*

On the other hand, if the Yards Company were not possessed of Armour's goods as carrier's agent, the responsibility of the railroad to Armour is definite and certain under the Bills of Lading Act, and the Commission is without power to adjudicate violations of that Act, or to award damages for its violation.

Conclusion.

We quote one sentence from the complaint which in our opinion conclusively settles the first issue of fact, on a motion to dismiss (emphasis supplied):

> "That the Plaintiff had at no time prior to receipt of such notice,* as to any of such shipments, exercised *any* dominion or control, or given *any* direction *either* to the Defendant transporting any such shipment, *or* to Defendants' agent, the said Stock Yards Company,

*i. e., notice that the shipment had arrived.

as to the *time or manner of unloading*, the *platform at which*, or *the chutes or pens through or into which the said livestock was to be unloaded*, or held pending tender of delivery or in *any way directed or controlled*, or *attempted* to direct or control *either* the Defendants, *or* any of them, *or* the said Stock Yards Company, in respect to *unloading*, yarding, driving, or handling of *any* shipment of said livestock, nor had any tender of any of said shipments been theretofore made to Plaintiff, *either* by the Defendant who transported the same to Union Stock Yards, *or* by the Stock Yards Company." (Rec. 10.)

In the face of this plain allegation, the contention of the railroads, grounded as it is upon a *confusion of their own tariff name of their own railroad station* "Union Stock Yards, Illinois," with a trade name used for the public yards "Union Stock Yards," and an attempt to interchange one for the other, as needs require, seems to us to be weak indeed.

If any confusion results from the similarity of the railroad name of its station, to the popular name of the public stock yards, that confusion can not be laid at Armour's door. And if such confusion does result, we believe the Court should accept the interpretation of counsel who wrote the complaint, rather than of counsel whose clients are solely responsible for the confusion.

The Circuit Courts of Appeal have recently considered similar situations, and made the following pronouncements (emphasis supplied):

"We are therefore *required* to deal with the broad question whether the facts alleged in the amended petition, *viewed in the light most favorable to petitioner*, are insufficient to support its claim for a refund." (*Grain Belt Co.* v. *Comm'r. Int. Rev.*, 109 Fed. (2d) 490, at 492.)

"* * * We think there is no justification for discussing a complaint for insufficiency of statement, except where it appears *to a certainty*, that the plaintiff would be entitled to *no* relief under *any state* of facts

which could be proved in support of the claim." (*Leimer* v. *State Mut. Life Ins. Assoc.*, 108 Fed. (2d) 302, at 306.)

Under a correct conception of the facts, it seems obvious to us that this case is controlled by the decisions of this Court in:

Covington Stock Yards Co. v. *Keith*, (139 U. S. 128), cited as the law of the land by this Court in its decision not quite a year old, in *Union Stock Yards & T. Co.* v. *United States*, 308 U. S. 213.

Erie Railroad Co. v. *Shuart*, 250 U. S. 465, cited as the law of the land in the same recent decision, and

Galveston, H. & S. A. R. R. v. *Wallace*, 223 U. S. 481.

Respectfully submitted,

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APPENDIX A.

Sec. 9, Title 49, U. S. C. A.:

"Remedies of persons damaged; election; witnesses. Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable *under the provisions of this chapter*, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Sec. 22, Title 49, U. S. C. A.:

"* * * nothing in this chapter contained shall in any way *abridge or alter the remedies now existing at common law or by statute*, but the provisions of this chapter are in addition to such remedies; * * *."

Sec. 12(1), Title 49, U. S. C. A.:

"(1) Authority, duties, and proceedings of commission; witnesses.

"The commission created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this chapter, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have

the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is authorized and required *to execute and enforce the provisions of this chapter;* and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the *enforcement of the provisions of this chapter* and for the punishment *of all violations thereof,* and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and *for the purposes of this chapter* the commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation."

Sec. 13(1), Title 49, U. S. C. A.:

"Complaints to and investigations by commission.—(1) Complaint to commission of violation of law by carrier; reparation; investigation. Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything *done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof,* may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be

any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Sec. 15(1), Title 49, U. S. C. A.:

"(1) Commission empowered to determine and prescribe rates, classifications, etc. Whenever, after full hearing, upon a complaint made *as provided in section 13 of this chapter,* or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the *commission shall be of opinion that any* individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property or for the transmission of messages as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, *or otherwise in violation of any of the provisions of this chapter,* the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Sec. 16(1), Title 49, U. S. C. A.:

"(1) Orders by commission for payment of damages. If, after hearing on a complaint *made as provided in section 13 of this chapter*, the commission shall determine that any party complainant is entitled to an award of damages under *the provisions of this chapter for a violation thereof*, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

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